UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE 1899 L Street, N.W. 12th Floor Washington, D.C. 20036 Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 1200 Pennsylvania Avenue, N.W. Ariel Rios Building Washington, D.C. 20460 Defendant.	)	C.A. No. 12-1497

COMPLAINT FOR DECLARATORY RELIEF AND RELIEF IN THE FORM OF MANDAMUS

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA" or "the Agency"), alleges as follows:

1) This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel production under one request for certain EPA records representing a senior official's performance of his official duties and otherwise relating to agency business.

2) In a FOIA request initiated on May 1, 2012, CEI sought specifically described records sent to or from any email address used by EPA Region 8 Administrator James M. Martin for official or work-related duties, expressly including accounts not provided by EPA for the conduct of Mr. Martin's official business.

3) Defendant responded to Plaintiff regarding emails *sent to* a private Martin email address, stating without support that "Documents sent to a personal email address that an individual is not intending to use for official purposes are not Agency records."

4) Defendant has not responded to Plaintiff's request for email sent from a private Martin email address.

5) Defendant responded to Plaintiff's request for certain correspondence from Mr. Martin's official EPA email account, by providing some records.

6) Defendant also withheld two records from this official EPA account in full, both of which were email correspondence between Mr. Martin and a representative of an environmental advocacy group. Defendant cited FOIA Exemption 6 (protecting the personal privacy of the non-Agency correspondent).

7) Plaintiff administratively appealed the failure to search for, or alternately to produce, records sent to a private Martin email address; appealing Defendant's failure to respond to the request for email sent from a private account; and appealing Defendant's withholding in full of two documents the Agency admits to possessing.

8) It has been five months since Plaintiff's original request.

9) It has been eight weeks since Plaintiff filed its administrative appeal of Defendant's initial determinations.

10) Defendant has failed to respond to Plaintiff's appeal.

11) In the face of an increasing number of revelations about senior government employees turning to private email accounts to conduct official business, circumventing the requirements of statutory and regulatory record-creating and

record-keeping regimes, EPA refuses to comply with its FOIA obligations in the present matter.

12) EPA is subject to FOIA and therefore FOIA's obligations.

13) Plaintiff has exhausted its administrative remedies.

PARTIES

14) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.

15) Defendant EPA is a federal agency headquartered in Washington, DC whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

16) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

17) Venue is proper in this Court under 28 U.S.C. § 1391(b) because Plaintiff's and Defendant EPA's principal place of business is in the District of Columbia.

FACTUAL BACKGROUND

18) Transparency in government is the subject of high-profile promises from the president and attorney general of the United States arguing forcefully against practices such as that used to avoid complying with Plaintiff's request.

19) Attorney General Holder states, *inter alia*, "On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA 'should be administered with a clear presumption: In the face of doubt, openness prevails.'" OIP Guidance, "President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a 'New Era of Open Government,'" http://www.justice.gov/oip/foiapost/2009foiapost8.htm. This and a related guidance elaborate on President Obama's memorandum.

20) This lawsuit seeks to compel EPA to respond fully and completely to one FOIA request dated May 1, 2012 (Ex. 1). The request sought specifically described records sent to, from or copied to any email address used by EPA Region 8 Administrator James M. Martin for official or work-related duties, expressly including accounts not provided by EPA for the conduct of Mr. Martin's official business.

21) Defendant EPA has acknowledged Plaintiff's request, granted Plaintiff's request to have its fees waived, and provided copies of some responsive records sent to or from Mr. Martin's official, EPA-provided email account.

22) EPA has also withheld two identified agency records, and denies that other requested records sent to or from non-official email accounts are agency records.

23) Plaintiff appealed this initial determination on July 19, 2012.

24) After nearly two months, Defendant has failed to respond to that appeal.

25) For five months EPA has refused to produce responsive records. Certain records at issue in this matter, those that were sent to or from Mr. Martin's private email account, reflect a practice, the widespread nature of which is only now emerging, of

government employees using non-official email accounts to conduct official duties, avoiding creation of the official record required by federal statute and regulation.[1]

Plaintiff's FOIA Request 08-FOI-00203-12 Seeking Certain Emails to or From Any Account Used by Administrator Martin for Official Business

26) On May 1, 2012, Plaintiff sent a request for records by electronic mail to EPA's Region 8 FOIA officer at r8foia@epa.gov, stating in pertinent part and using language and format customary for federal agency FOIA search parameters:

> 1) We seek all emails sent to, from or copied to any email address used by James M. Martin for official or work-related duties, including but not limited to any address provided by EPA (EPA/Mr. Martin must provide any responsive emails

[1] *See, e.g.*, "at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business." August 14, 2012 Letter from U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa (R-Calif.) and subcommittee Chairman Jim Jordan (R-Ohio) and Trey Gowdy (R-S.C.) to Energy Secretary Steven Chu, http://oversight.house.gov/wp-content/uploads/2012/08/2012-08-14-DEI-Gowdy-Jordan-to-Chu-re-loan-program-emails.pdf). *See also*, Jim Snyder, "Brightsource Warned Of Embarrassment To Obama In Loan Delay", Bloomberg, June 6, 2012, http://www.bloomberg.com/news/2012-06-06/brightsource-warned-of-embarrassment-to-obama-from-loan-delays.html.

And see, Eric Lichtblau, "Across From White House, Coffee With Lobbyists," *New York Times*, June 24, 2010, http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?pagewanted=all (lobbyists "routinely get e-mail messages from White House staff members' personal accounts rather than from their official White House accounts, [the latter] which can become subject to public review"); *and see* Nick Bauman, "Starbucksgate: Obama's Lobbyist/Email Scandal," *Mother Jones*, June 28, 2010, http://motherjones.com/mojo/2010/06/starbucksgate-crew-calls-investigation-white-house (White House aides "using private email accounts to schedule coffee shop meetings with lobbyists (an apparent attempt to prevent these sessions from appearing in White House visitor logs)").

Plaintiff also notes the revelation that then-White House Deputy Chief of Staff Jim Messina used his AOL account to orchestrate a deal to obtain lobbying support of the drug industry for "Obamacare". *See*, "Promises Made, Promises Broken: The Obama Administration's Disappointing Transparency Track Record", report by the U.S. House of Representatives Committee on Energy and Commerce, Volume 1 Issue 3, July 31, 2012, http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReport.pdf, and supporting documents at http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReportSupportingDocs.pdf.

on private accounts, e.g., but not limited to James.martin.dnr@gmail.com, james.martin.cdphe@gmail.com and/or james.martin.epa@gmail.com);

2) Filtered on: (Time Message Sent Later Than 04/23/2010 12:00:01 AM and Time Message Sent Earlier Than 05/01/2012 11:59:59 PM;

3) and (Body Contains Environmental Defense
or (Display "To:" Contains @EnvironmentalDefense.org
or Display "From:" Contains @ EnvironmentalDefense.org
or Display "CC:" Contains @ EnvironmentalDefense.org
or Display "Bcc:" Contains @ EnvironmentalDefense.org

Defendant's Response to Plaintiff's FOIA Request

27) EPA acknowledged this request on May 7, 2012, assigning it the identification number 08-FOI-00203-12.

28) On May 7, 2012, EPA also granted Plaintiff's request for a fee waiver, as FOIA provides for when "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

29) On May 29, 2012, EPA took an extension of time to respond to Plaintiff's request, on the basis of "[t]he need for consultation...with another agency or EPA office having a substantial subject matter interest in your request."

30) On July 5, 2012, Plaintiff telephoned EPA Region 8 FOIA specialist Vicki Ferguson seeking the status of EPA's handling of Plaintiff's request. Ms. Ferguson stated that the Request had been sent to EPA Headquarters for consultation.

31) By letter dated that same day, EPA Region 8 acknowledged this conversation and provided Plaintiff some responsive records.

32) EPA also withheld, with no redactions but in their entirety, two specifically described records from Mr. Martin's EPA email account (martin.jim@epa.gov) reflecting

correspondence with Dan Grossman of Environmental Defense Fund (EDF), plus the entirety of prior emails in same threads, all dated April 12, 2011. EPA cited Exemption 6 and "personal privacy interest of the non-EPA correspondent" to withhold every word in the email threads, including all words written by the EPA official but grounded in the need to protect the privacy of the non-EPA correspondent.

33) EPA stated "There are no other agency records responsive to your request."

34) Regarding records responsive to Plaintiff's request to or from Martin's non-official email accounts, Defendant wrote, "Documents sent to a personal email address that an individual is not intending to use for official purposes are not Agency records."

35) Defendant offered no support for this claim and there is no authority for this new standard that the source of an email or its owner's alleged blanket intent when creating an email account dictates whether it is an agency record under federal law and regulation.

36) Regardless, Defendant EPA does not respond to Plaintiff having demonstrated that Martin's chosen address format for his private accounts used for public business indicate the accounts' purpose (e.g., James.Martin.cdphe@gmail.com [for correspondence relating to Martin's employment with the Colorado Department of Public Health and Environment], and James.Martin.dnr@gmail.com [for correspondence relating to Martin's employment with the Colorado Department of Natural Resources]).

37) Plaintiff provided exemplars of these records in its administrative appeal in the instant matter.

38) Defendant also does not how such a standard, if adopted, would work consistent with FOIA and other applicable federal law and regulations which on their face do not accommodate such invention (*e.g.*, Federal Records Act of 1950, 44 U.S.C. 3101 et seq., and the E-Government Act of 2002; 36 C.F.R. Subchapter B, Records Management, and all applicable National Archives and Records Administration (NARA) mandated guidance).

39) Defendant's rationale for denying Plaintiff's request for email sent to a private account does not clearly indicate whether Defendant refused to search for such records, or refuses to produce them to Plaintiff.

40) By this Defendant also failed to respond at all to Plaintiff's request for records sent *from* a private email address.

41) Defendant does not cite any reason for not responding to that element of Plaintiff's request.

42) On July 19, 2012, Plaintiff filed an administrative appeal with Defendant, sent by electronic mail as set forth in Agency regulations and correspondence with Plaintiff, to hq.foia@epa.gov.

43) In its appeal Plaintiff informed Defendant of Mr. Martin's history of using non-official email accounts to perform official business, and provided as exhibits exemplars obtained under Colorado's open records law.

44) EPA is required to respond to appeals within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii).

45) For nearly two months, Defendant has failed to respond to Plaintiff's appeal.

46) As a result of the above, Plaintiff has exhausted its administrative appellate opportunities and has no recourse but to file this lawsuit.

LEGAL ARGUMENTS

Records Reflecting Official Business are Agency Records

47) The Department of Justice notes that "'Records' is not a statutorily defined term in FOIA. In fact it appears that the only definition of this term in the U.S. Code is that in the Federal Records Act. 44 U.S.C. § 3301." *What is an "Agency Record?"*, U.S. Department of Justice FOIA Update Vol. II, No. 1, 1980, http://www.justice.gov/oip/foia_updates/Vol_II_1/page3.htm.

48) That definition of "records" for purposes of proper maintenance and destruction "includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, *regardless of physical form or characteristics, made or received* by an agency of the United States Government under Federal law or *in connection with the transaction of public business and* preserved or *appropriate for preservation by that agency* or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them" (emphasis added).

49) "The definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act."[2] FRA requires the document to somehow reflect the operations of government at some substantive level while FOIA

2 See, e.g., Environmental Protection Agency, "What Is a Federal Record?" http://www.epa.gov/records/tools/toolkits/procedures/part2.htm.

covers far more, including phone logs, annotations and the most seemingly inconsequential piece of paper or electronic record in an agency's possession. At bottom "the question is whether the employee's creation of the documents can be attributed to the agency for the purposes of FOIA." *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006).

50) Specifically as regards private email accounts, "Agencies are also required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts on commercial systems such as Gmail, Hotmail, .Mac, etc.)", and when used during working hours or for work-related purposes "agencies must ensure that federal records sent or received on such systems are preserved in the appropriate recordkeeping system and that reasonable steps are taken to capture available transmission and receipt data needed by the agency for recordkeeping purposes." Government Accountability Office, "Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management," GAO-08-742, June 2008, http://www.gao.gov/assets/280/276561.pdf, p. 37.

51) Agencies interpret extant record-keeping policy and FOIA as allowing for searching an employee's private accounts and equipment. *See, e.g.*, August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher C. Horner, Competitive Enterprise Institute in response to NOAA FOIA#2010-00199, stating in pertinent part, "NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the

home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions." (p. 2).

52) When confronted with similar behavior, the White House Office of Science and Technology Policy (OSTP) affirmatively rejected the argument set forth by EPA in the instant matter. After being informed that one of its officials was using non-official email for official business, the head of OSTP reminded employees that work-related email must be copied to the agency, in a memo to all staff, stating in pertinent part:

> In the course of responding to the recent FOIA request, OSTP learned that an employee had, in a number of instances, inadvertently failed to forward to his OSTP email account work-related emails received on his personal account. The employee has since taken corrective action by forwarding these additional emails from his personal account to his OSTP account so that all of the work-related emails are properly preserved in his OSTP account.
>
> If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account. In this way, all correspondence related to government business—both incoming and outgoing—will be captured automatically in compliance with the [Federal Records Act]".[3]

Other Jurisdictions Recognize Work-Related Email on Private Accounts as Public or Agency Records, Subject to Freedom of Information Laws

53) States with open records or freedom of information laws obtain and produce work-related email on non-official accounts in response to requests for public records. For example, in response to an 2010 Open Records Act request for correspondence pertaining to the drafting of and lobbying for the state's Clean Air Clean Jobs Act,

[3] May 10, 2010 Memo from OSTP Director John Holdren to all OSTP staff, titled "Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge", available at http://www.citizensforethics.org/page/-/PDFs/Legal/Investigation/Request_for_Investigation_into_White_House_20100628.pdf?nocdn=1 pp. 10-11.

Colorado produced email from two separate private email addresses for state employee Martin, during his two stints with two separate departments (the Colorado Department of Public Health and Environment and Department of Natural Resources).

54) The Illinois attorney general recently issued a binding opinion that communications on a private email account "pertaining to public business" were public records, with that state's FOIA having a definition of "public records" similar to the relevant federal definition (including "all . . . documentary materials pertaining to the transaction of public business, regardless of physical form") and its legislature having similarly intended a bias toward disclosure. *See* Public Access Opinion No. 11-006, November 15, 2011, http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-006.pdf.

55) That office rejected the notion that the creation of an account, as opposed to the records in question, dictated a record's status. ("Whether information is a 'public record' is not determined by where, how or on what device that record was created; rather, the question is whether the record was prepared by or used by one or more members of a public body in conducting the affairs of government. The focus is on the creation of the record itself, and how it was used." *Ibid.* (*See also*, "26 states view the use of private emails for government business as public records", Steven Braun, "Mitt Romney Used Private Email Accounts to Conduct State Business While Massachusetts Governor," *Huffington Post,* March 9, 2012, http://www.huffingtonpost.com/2012/03/09/mitt-romney-emails_n_1335712.html.)

56) Other countries with freedom of information acts likewise produce private email as public records when the content indicates the record is work-related.

57) U.S. courts look to other countries in construing similar laws (see *Olympic Airways v. Husayn*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (citing foreign court rulings interpreting Warsaw Convention), or even not so similar laws (see *Graham v. Florida*, 130 S.Ct. 2011 (2010) (citing "international opinion" and interpretations of foreign civil-liberties provisions in an Eighth Amendment case).

58) The United Kingdom's Freedom of Information Act was modeled after and resembles the U.S. federal law.

59) The UK Information Commissioner (Information Commissioner's Office ("ICO")) notes that "The use of private email accounts instead of departmental accounts for the conduct of official business is a matter of concern to the Commissioner for a number of reasons. Adherence to good records management practice should be encouraged to promote data security, to preserve the integrity of the public record and to ensure effective compliance with access to information obligations." *Ibid*, at p. 8.[4]

60) This is the same policy reflected in U.S. federal statute (Federal Records Act of 1950 44 U.S.C. 3101 et seq., the E-Government Act of 2002 and other legislation) and regulation (36 C.F.R. Subchapter B, Records Management, and all applicable National Archives and Records Administration (NARA) mandated guidance), and reflected in the GAO report cited, *supra*.

61) The UK's ICO confirmed that all official correspondence is subject to disclosure laws, specifically rejecting the UK Department of Education claim that work-related

[4] Information Commissioner addressed the issue because, as one British media outlet put it, "It would seem that as the UK has followed the US in its freedom of information laws, so our politicians seem to have also followed their Washington DC colleagues in their attempts to evade the law." Gavin Clarke, "Beware Freedom of Info law 'privacy folktale'—ICO chief," *Register* (U.K.), February 7, 2012, http://www.theregister.co.uk/2012/02/07/foia_review_information_commissioner/.

emails to and from Secretary Michael Gove on his Gmail account "do not fall within the FOI Act." United Kingdom Office of the Information Commissioner, "ICO Statement: Department for Education decision notice," March 2, 2012, http://www.ico.gov.uk/news/latest_news/2012/statement-department-for-education-decision-notice-02032012.aspx. *See also*, the email's status as an agency record is determined by its content. ICO, Decision Notice, March 1, 2012, PDF available by link at http://www.ico.gov.uk/news/latest_news/2012/statement-department-for-education-decision-notice-02032012.aspx, p. 6.

62) The UK ICO wrote, "It may be necessary to request relevant individuals to search private email accounts in particular cases" (ICO Decision Notice, at p. 1) because, regardless of with whom the governmental official corresponds, emails are the public's on the basis that "[I]nformation 'amounts to' public authority business, or whether information was 'generated in the course of conducting the business of the public authority'" (*Ibid*, at p. 5), and is thereby "held by" an agency even if on an agency employee's private email account.

63) As the UK ICO notes, "It should not come as a surprise to public authorities to have the clarification that information held in private email accounts can be subject to Freedom of Information law if it relates to official business," because "[t]his has always been the case—the Act covers all recorded information in any form." Quoted in Williams, C., "Civil servants to be forced to publish Gmail emails," *Telegraph* (U.K.), December 15, 2011, http://www.telegraph.co.uk/technology/news/8958198/Civil-servants-to-be-forced-to-publish-Gmail-emails.html.

Defendant EPA Owes a Reasonable Search

64) EPA's response to Plaintiff stating that all emails sent from his private email account are not agency records, and failing to address requested records sent to Martin's private email accounts, presents two possible scenarios. First is that it did search those accounts or otherwise possesses such records from those accounts responsive to Plaintiff's Request but refuses to produce them on the basis of this unsupportable standard. Alternately, EPA failed to adequately search for such records as required. EPA did not inform Plaintiff which scenario describes its actions or position.

65) FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

66) The term "search" means to "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3). *See Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

67) A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). The search must be "'adequate'" on the "'facts of this case.'" *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir 1986) (per Bork, Scalia and MacKinnon, J.J.) (internal citations omitted).

68) The reasonableness of the search activity is determined ad hoc but there are rules, including that it cannot be cursory. *See Citizens For Responsibility and Ethics in Washington v. U.S. Department of Justice*, 2006 WL 1518964 *4 (D.D.C. June 1, 2006) ("CREW") ("The Court is troubled by the fact that a mere two hour search that started in August took several months to complete and why the Government waited [for several months] to advise plaintiff of the results of the search."). Reasonable means that "all files likely to contain responsive materials . . . were searched." *Cuban v. SEC*, No. 09-996, 2011 U.S. Dist LEXIS 71064 (D.D.C. July 1, 2011).

69) Courts inquire into both the form of the search *and* whether the correct record repositories were searched. "[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *See e.g., Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An unsupervised search allowing for abuses is not reasonable and so does not satisfy FOIA's requirements. See *Kempker-Cloyd v. Department of Justice*, W.D. Mich. (1999). An agency must search "those files which officials expec[t will] contain the information requested." *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 30 n.38 (D.D.C. 1998). Agencies cannot structure their search techniques so as to deliberately overlook even a small and discrete set of data. *See Founding Church of Scientology of Washington, D.C. v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (holding an agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked).

70) It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S.

749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)).

71) The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Ibid.*

72) Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an Exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n. 3; *Consumer Fed'n of America,* 455 F.3d at 287; *Burka*, 87 F.3d at 515.

73) If it is likely that responsive records exist on non-official email accounts (or equipment) the agency must search an employee's private accounts and equipment. *See, e.g.,* Aug. 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher Horner, Competitive Enterprise Institute, in response to NOAA FOIA#2010-00199, stating, "NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions." (p. 2).

74) If a requester presents an agency with evidence that it overlooked responsive documents it must act upon it. *Campbell v. Department of Justice*, 164 F.3d 20, 28-29 (D.C. Cir. 1999). "[A] law-abiding agency" must "admit and correct error" in its searches "when error is revealed." *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986). In *Friends of Blackwater v. Department of the Interior*, the D.C. Circuit Court of Appeals held it was "inconceivable" that no drafts or related correspondence existed of documents produced from the agency's office existed, and found the search inadequate on those grounds. 391 F. Supp. 2d 115, 120–21 (D.D.C. 2005).

Exemption 6 Does Not Exempt Correspondence for Reflecting a Close Relationship

75) Citizens have an overall right to obtain public records even if portions of the requested records are exempt from disclosure, unless somehow release of the non-exempt portions is not possible for reasons of burden or they would reveal the content of the redacted, exempt portions. 5 U.S.C. § 552(b).

76) If information is properly exempt, an agency has an obligation to redact only that information in a record which might properly be subject to Exemption 6. If only a portion of a document is exempt, the responding agency must redact that portion and release the remainder of the document. *Ibid*.

77) Attorney General Holder similarly instructed that, when a record has information that is properly withheld, the agency should look to redacting portions, not the entire record. This instruction is simply consistent with long-standing law and policy. Plaintiff also notes the attorney general's memorandum published on March 19, 2009. Attorney General Eric Holder, Memorandum for the Heads of Executive Departments

and Agencies, "The Freedom of Information Act," March 19, 2009, http://www.justice.gov/ag/foia-memo-march2009.pdf.

78) Exemption 6 permits the government to withhold information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." DoJ's Freedom of Information Act Guide, May 2004, discussing Exemption 6 (citing to FOIA, 5 U.S.C. § 552(b)(6) (2000)).

79) "Personal" for Exemption 6 purposes does not mean reflects a personal relationship, but instead but has a particular meaning, including that the release would impermissibly violate an individual's right to privacy.

80) It is FOIA's "golden rule" that "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." (*GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); see also *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.1987)). EPA must demonstrate that the entirety of these words are exempt under Exemption 6.

81) "These exemptions are explicitly made exclusive, and must be narrowly construed." *Milner v. Dept. of the Navy*, 131 S. Ct. 1259, 1262 (2011) (internal quotations and citations omitted) (citing *FBI v. Abramson*, 456 U.S. 615, 630 (1982)); see also *Public Citizen v. OMB*, 598 F.3d 865, 869 (D.C. Cir. 2010).)

82) DoJ's Freedom of Information Act Guide continues, "Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue 'would constitute a clearly unwarranted invasion of personal privacy.'" (internal citations omitted)

83) If specific information -- particular to the correspondent and rising to the level of "personal" as captured by Exemption 6's use of the term -- found in the body of the email rises to the level of impermissibly violating an individuals' right to privacy, then EPA may properly redact it. If it is simply the sort of embarrassing information or "personal" or other conversation reflecting the closeness of the relationship between the lobbyist and the lobbied, then of course EPA may not properly do so.

84) Relevant to this, Plaintiff draws particular attention to the President's instruction that "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve." *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). The Presidential directive merely reflects EPA's longstanding position on information dissemination and access. EPA regulations reiterate the bias toward release.

85) The two records that EPA withheld from Plaintiff in their entirety are not found in a personnel, medical or similar file, and may be reasonably presumed to pertain to Martin's official duties in that they are a) to and from an Environmental Protection Agency official b) using his official email account c) despite having personal accounts, d) with a representative of an environmental pressure group with which the EPA official works on EPA matters regularly, f) using the group's email system and account assigned for performing the group's work (and this individual is also fairly assumed to have a private email account), and g) include several exchanges written

not by the individual whose personal information if released would allegedly be a clearly impermissible violation of his personal privacy, but the EPA official.

86) Also, the rest of EPA's production affirms that Martin and representatives of EDF were regular correspondents about business matters, in their capacity as representatives of EPA and pressure groups with interests impacted by EPA, and particularly Martin's office.

87) This professional relationship is also affirmed by other emails released under open records laws or otherwise in the public record, including but not limited to exemplars Plaintiff provided as Exhibit 3 in its administrative appeal.

88) Plaintiff specifically cited in its request to EPA the presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). The President directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA."

89) The attorney general reaffirmed this with the *Memorandum for the Heads of Executive Departments and Agencies*, "The Freedom of Information Act," March 19, 2009, and OIP Guidance, "President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a 'New Era of Open Government,'" http://www.justice.gov/oip/foiapost/2009foiapost8.htm.

FIRST CLAIM FOR RELIEF
Release of Certain Records Sent To or From Any Email Account Used by Administrator Martin for Official Business -- Declaratory Judgment

90) Plaintiff re-alleges paragraphs 1-89 as if fully set out herein.

91) Plaintiff provided Defendant EPA with evidence of Administrator Martin's history and practice of using non-official email accounts for official government business.

92) Other governmental agency employers of Mr. Martin in the past have turned over such records in response to open records or freedom of information requests.

93) FOIA requires all doubts to be resolved in favor of the requestor, and of disclosure.

94) Plaintiff is owed and Defendant has failed to conduct an adequate search or production responsive to Plaintiff's request including, given Mr. Martin's demonstrated practices, of Mr. Martin's private email accounts.

95) By simply declaring that emails sent to Martin's non-official accounts are, by that virtue, not agency records, EPA did not satisfy its burdens under FOIA. Defendant then compounded this by failing to respond to Plaintiff's administrative appeal.

96) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

97) Plaintiff has a statutory right to the information it seeks.

98) Defendant refused to respond to Plaintiff's administrative appeal of this.

99) Plaintiff has constructively exhausted its administrative remedies.

100) Plaintiff asks this Court to enter a judgment declaring that

i. EPA records sent to or from any account used by Administrator Martin for official business as described in Plaintiff's request 08-FOI-00203-12, are public records subject to release under FOIA unless subject to one of that Act's mandatory exclusions;

ii. EPA has either failed to perform an adequate search of all such accounts for records responsive to Plaintiff's request, or has but failed to produce or justify withholding such records;

iii. EPA's denial of Plaintiff's FOIA Request seeking the described records is not reasonable, and does not satisfy EPA's obligations under FOIA;

iv. EPA's refusal to produce the requested records is unlawful; and

v. EPA must release the requested records.

SECOND CLAIM FOR RELIEF
Release of Certain Records Sent To or From Any Email Account Used by Administrator Martin for Official Business -- Injunctive Relief

101) Plaintiff re-alleges paragraphs 1-100 as if fully set out herein.

102) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's request described, *supra*.

103) Plaintiff asks this Court to enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining Defendant from further withholding responsive records and ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order the described, requested records pertaining to the group Environmental Defense, or a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

THIRD CLAIM FOR RELIEF
Release of Two Documents Withheld in Full -- Declaratory Relief

104) Plaintiff re-alleges paragraphs 1-103 as if fully set out herein.

105) EPA has failed to meet that obligation to properly redact and produce non-exempt information, withholding the entirety of both documents, which failure is arbitrary and capricious.

106) EPA merely cited Exemption 6 and "personal privacy interest of the non-EPA correspondent" in withholding the entirety of two email threads to/from Jim Martin on his official address (martin.jim@epa.gov), reflecting Martin's correspondence with Dan Grossman of Environmental Defense Fund (EDF), all dated April 12, 2011.

107) EPA provides no indication how any, let alone the entirety, of the withheld documents (including the EPA official's writings), satisfies Exemption 6 factors.

108) EPA arbitrarily and capriciously withheld the requested information in full from Plaintiff.

109) EPA has failed to establish the basis for withholding the identified records, and must conduct the Exemption 6 test, produce the cited records redacting any exempt portions and justifying those exemptions, or satisfy its burden of establishing that the entirety of the document must be withheld.

110) Plaintiff asks this Court to enter a judgment declaring that

i. EPA's withholding of correspondence between Administrator Jim Martin and Dan Grossman of Environmental Defense held on agency email accounts is not reasonable, and does not satisfy EPA's obligations under FOIA;
ii. EPA's refusal to produce the requested records is unlawful; and
iii. EPA must produce identified, withheld records or this Court, after de novo review in camera pursuant to 5 U.S.C. § 552(a)(4)(B), after conducting the Exemption 6 balancing test, should order production of the described information redacting any exempt portions and justifying those exemptions.

FOURTH CLAIM FOR RELIEF
Release of Two Documents Withheld in Full -- Injunctive Relief

111) Plaintiff re-alleges paragraphs 1-110 as if fully set out herein.

112) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's Requests described, *supra*.

113) Plaintiff asks this Court to enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining Defendant from further withholding responsive records and ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the described, requested records pertaining to the group Environmental Defense, or a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

FIFTH CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

114) Plaintiff re-alleges paragraphs 1-113 as if fully set out herein.

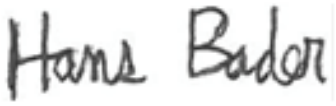
115) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

116) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

117) Plaintiff has a statutory right to the records that it seeks, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 11th day of September, 2012,



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